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No. 90-1692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL GLECIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. The government, of course, does not dispute the fact that Glecier's single count RICO conspiracy indictment failed to allege specifics regarding the alleged "pattern of racketeering activity." Yet, the government maintains that this indictment, although devoid of factual allegations pertaining to the so-called "pattern of racketeering activity", was legally sufficient. In so arguing, however, the government does not address Glecier's contention that the

unspecific indictment did not give recognition to the crime-within-a-crime nature of RICO. *See generally United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986). As noted in our petition, not requiring identification of the specific predicate acts allegedly agreed to and comprising the "pattern of racketeering activity" contravenes the accepted notion that RICO is not actually a new crime, but is a prerequisite for enhanced punishment for violations of other laws. *Id.* From this proposition, it is plain that specific identification of the predicate acts that are part of the alleged "pattern" is necessary.

The government contends that the general allegation that the petitioner supposedly agreed to "multiple acts involving bribery" satisfies the Fifth and Sixth Amendment criminal pleading standards. However, the government fails to address this Court's line of cases that mandate inclusion of the essential *facts* constituting the alleged crime. *United States v. Russell*, 369 U.S. 749 (1962); *United States v. Hess*, 124 U.S. 483, 487 (1888); *United States v. Cruickshank*, 92 U.S. 542, 558 (1875). In addition, Rule 7(c) of the Federal Rules of Criminal Procedure requires factual allegations.[1] Here, in violation of this Court's cases and Rule 7(c), the indictment did not make factual allegations regarding the "pattern" allegedly agreed to by the petitioner. These violations compel the granting of Glecier's certiorari petition.

The government also says a general allegation that the petitioner engaged in "multiple acts of bribery" is sufficient

[1] The government gives lip service to Rule 7(c), but alludes to the notion that a bill of particulars can cure a vague indictment. Govt's Response at 5. This argument is not only hollow, but is ironic, given that the government goes to bat for the denial of Glecier's motion for a bill of particulars.

to put the petitioner on notice. This depth of argument is superficial at best. Obviously, for a meaningful defense to be mounted, specific "pattern" allegations are necessary. Moreover, as a practical matter, the present indictment gave no notice at all with respect to the allegations that formed the core of criminality. Indeed, Petitioner Glecier, as a lawyer and judge, handled thousands of cases during the alleged seven year conspiracy period. Hence, it is absurd to believe that the indictment—which did not specifically identify the alleged "pattern of racketeering activity"—provided sufficient notice from which Glecier could prepare a timely, meaningful and effective defense.

The government concedes that an indictment would be insufficient, and expand the scope of the grand jury's consideration, if it omits an "allegation going to 'the very core of criminality.'" Govt's Response at 9. There can be little debate that the alleged "pattern of racketeering activity" forms the core of criminality in a RICO trial. In fact, the other RICO elements, i.e., existence of the enterprise and the defendant's association (or employment) with the enterprise, are typically *pro forma* points of contention.[2] Thus, there is no good reason for excusing an indictment that fails to set forth specifics regarding the "pattern of racketeering activity" allegedly agreed to by the defendant during the course of a seven year conspiracy. Such omission violates the Fifth and Sixth Amendments.

The government also denies dissonance between the opinion below and *United States v. Phillips*, 874 F.2d 123 (3rd Cir. 1989), *United States v. Angiula*, 847 F.2d 956,

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[2] In this case, the enterprise was the Circuit Court of Cook County. Nobody denied its existence, or the petitioner's association with it. (The petitioner practiced as a lawyer and later worked as a judge in this court system.)

964 (1st Cir. 1988) and *United States v. Gatto*, 746 F. Supp. 432, 459-60 (D. N.J. 1990). *See also United States v. Marino*, 648 F.2d 367, 396 (5th Cir. 1981) ("Absent a *charge* and proof of an agreement to commit two of the *specified* predicate crimes, defendant cannot be convicted of" RICO conspiracy) (emphasis supplied). However, in so doing, it fails to address the actual language of these cases. Indeed, these cases expressly state that *specific* allegations regarding the "pattern" element are required in a RICO conspiracy indictment. *See* Cert. Pet. 10-11 (quoting language of cases). Thus, contrary to the government's argument, a conflict exists and should be reconciled by this Honorable Court.

Furthermore, the government has not reconciled the decision below with *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986). Again, we must stress that *Neapolitan* rejected the idea that a RICO indictment is sufficient if it alleges general criminal activity, leaving development of the particulars for trial:

> Thus, it would be sufficient, according to this argument, for the indictment to state that the defendant engaged in various acts of bribery. This argument misconceives the nature of any RICO offense. Under the statutory scheme the predicate acts are not only important 'elements of the crime' but they are also by definition, distinct offenses. Because RICO provides for the commission of these predicate crimes in a specified context . . . the failure to specify the underlying criminal activity in the indictment can effectively preclude exact identification of what is being charged. RICO cannot be viewed as a complete offense distinct from the underlying crimes upon which it is based.

791 F.2d at 501. Given this language, there simply is no reconciling the decision below with *Neapolitan*—regardless of what Chief Judge Bauer maintained.

In sum, the decision below is at odds with the very nature of RICO, the constitutional pleading standards established by this Court, Rule 7(c) of the Federal Rules of Criminal Procedure, decisions from other circuits and the Seventh Circuit's prior decision in *Neapolitan*. Accordingly, the petition for certiorari should be granted.

2. The petitioner, a judge, was put to trial for RICO conspiracy, an offense carrying a possible twenty year prison term. The indictment was vague. A bill of particulars was refused. The court of appeals affirmed the denial of the bill of particulars.

In response to the petitioner's point regarding the denial of the bill of particulars, the government resorts to the supposed extensive pre-trial discovery. It dismisses the lack of ample notice by noting that the *Santiago* proffer, filed a mere five days before trial, was filed "nearly two weeks before McDermott testified and more than two weeks before Costello and Polikoff testified." Govt's Response at 11. However, in a trial where a man's liberty and livelihood are at stake, two weeks simply is insufficient time in which to investigate and prepare a defense to dated allegations which spanned seven years.[3] It should be remembered that "the adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82 (1970). In this case, the government's close-to-the-vest tactics rendered the trial more akin to a poker game than a fair and balanced adversarial process. The denial of the

[3] The government also points out that Glecier's counsel interviewed William Kampegna three weeks before trial. The government does not point out that Kampegna denied paying any money to Judge Glecier.

motion for a bill of particulars constituted an abuse of discretion. Certiorari should be granted.

The government further contends that there is no conflict between *United States v. Davidoff*, 845 F.2d 1151, 1154 (2nd Cir. 1988) and the Seventh Circuit's opinion this case, given the alleged pretrial discovery provided here. This argument overlooks the text of *Davidoff*. In *Davidoff*, the court stated, "[n]or can the Government excuse the lack of a bill of particulars by contending that information concerning [the victims not specified in the indictment] was contained in Jencks Act statements" turned over during jury selection and during the trial. In addition, the government in *Davidoff* tendered "some 6,000 pages" of wiretap material; however, the *Davidoff* court deemed this turn-over as an "equally inadequate" cure for the lack of bill of particulars. *Davidoff*, 845 F.2d at 1155. Thus, contrary to the government's contention, a difference in pretrial discovery is not a sufficient basis upon which to distinguish *Davidoff*. A conflict exists and should be remedied by this Honorable Court.

It is true that the *Davidoff* court stated that the prosecution would not be required to "disclose in advance of trial every act it will prove that may violate some criminal statute." 845 F.2d at 1154. In this case, Petitioner Glecier was not asking for disclosure of every act. He merely requested, by way of a bill of particulars, the specifics regarding the alleged "pattern of racketeering activity." This certainly was not asking too much, especially in light of the fact that the alleged "pattern of racketeering" represented the core criminal allegations in dispute. A bill of particulars should have been granted.

3. In addressing the petitioner's point that the RICO statute is void for vagueness, the government says little. It does not adequately face the dissension on this

Court or the reoccurring criticism regarding RICO's ambiguous terms. In any event, given the unrest, the question of RICO's constitutionality will not dissipate or go away. This case presents an opportunity for this Court to address this important issue.

The government claims that RICO withstands constitutional scrutiny in this case because the petitioner allegedly has not shown that the statute is vague as applied. We disagree. The petitioner was charged with agreeing to a "pattern of racketeering activity" consisting of unspecified "multiple acts of bribery." As applied, these allegations are void for vagueness. First, if the meaning of the "pattern" requirement cannot be ascertained as general matter, see *H.J., Inc. v. Northwestern Bell Telephone*, 492 U.S. 229 (1989) (Scalia, J., concurring), it certainly could not have been deciphered by the petitioner in this case. Furthermore, absent *specification* of alleged "multiple acts of bribery" comprising the "pattern", the indictment's allegations were facially vague. The petitioner was deprived of notice required by the Due Process Clause. Certiorari, therefore, should be granted.

Respectfully submitted,

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